IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 654 OF 1997

Shri Pandu Laxman Bhalerao .. Appellant

vs.

Shri Narayan Sukhadeo Bhalerao
and ors. .. Respondents

Ms. Sharaddha Y. Mohite h/f Mr. I.S. Thakur & Ms. Shilpa Gajare for appellant.
Mr. R.N. Kachare h/f Mr. P.N. Joshi for Respondents.

CORAM: B.H. MARLAPALLE, J.

Date : June 27, 2005.

ORAL JUDGMENT:

1. Being aggrieved by the Judgment and Order dated 20/11/1996 pronounced by the learned Additional District Judge at Nashik in Civil Appeal No.268 of 1991, this Appeal from Order has been filed.

2. Regular Civil Suit No.52 of 1988 was dismissed by the learned Civil Judge, Junior Division, Sinnar on 29/6/1991 and the Lower Appellate Court was pleased to set aside the said order by remanding the suit to the

trial court in accordance with the provisions of Order 41, Rule 23 of C.P.C. and with a further direction that the appellant- defendant no.1 shall be given opportunity to bring the LRs of defendant no.3 on record. On remand the trial of the suit was to start from the stage which had taken place after the demise of defendant no.3.

3. The present respondent no.1 was the plaintiff in Regular Civil Suit No.52 of 1988 and he claimed that agricultural land in Gat No.12 is owned and possessed by him and he had installed an electric motor on the well located in the suit land. He was lifting water with the help of the said electric motor for irrigating the land of Gat Nos.12 and 24. He further alleged that the defendants who are his cousins owned the agricultural land in the neighbouring Gat No.13 and they had started obstructing him from pumping out water from the said well. He alleged that the defendants had managed to get the revenue record manipulated so as to show that the suit well was located in the land in Gat No.13 instead of Gat No.12 for which he had lodged a

complaint on 18/6/1987. As there was no steps taken by the Talathi, he approached the court below for the relief of perpetual injunction against the defendants.

4. The trial court on assessment of the evidence recorded a finding that the plaintiff was not the exclusive owner and the user of the suit well, though he was the owner of the electric motor installed over the said well and he could not prove the alleged obstruction on the part of the defendants. The trial court, therefore, held that the plaintiff was not entitled for any relief as prayed by him and, therefore, the suit was dismissed.

5. The Lower Appellate Court noted that the decree was passed on 29/6/1991 by the trial court but the defendant no.3 died on 10/5/1991 and thus the decree was passed against a dead person. On this ground alone the appeal came to be partly allowed by remanding the trial of the suit. Even though the LRs of defendant no.3 were brought on record in the appeal proceedings, the Lower Appellate Court was of the view that the suit was required to be retried at the stage

which had taken place after 10/5/1991 i.e. after the demise of defendant no.3.

6. At the out set it is required to be noted that there was no decree passed in RCS No.52 of 1988 and the trial court was pleased to dismiss the said suit on 29/6/1991. Thus, the observation made by the Lower Appellate Court that a decree was passed against a dead person is contrary to the record. It was further pointed out by the learned counsel for the appellant-defendant no.1 that remand of the suit by invoking powers under Order 41 Rule 23 was uncalled for in as much as RCS No.52 of 1988 was decided by the trial court on merits. This objection appears to be sound. However, it is not known to both the learned counsel whether the hearing in RCS No.52 of 1988 was completed before 10/5/1991 and the date for pronouncement of judgment was notified. There was no reason to remand the suit for de novo trial, in case the trial court had reserved its judgment by concluding the hearings prior to 10/5/1991.

7. There is no order of injunction either temporary or permanent operating against the original defendant no.3 or his LRs as at present and, therefore, there is no prejudice likely to be caused to the present appellant if the suit remanded is decided afresh from the stage as indicated above. But at the same time the remand could not have been under Order 41 Rule 23 and instead it ought to be under Order 41 Rule 23A. This is only a procedural technicality and the effect of the remand is the same in as much as the remand made under Rule 23A of Order 41 is in fact the remand made under Rule 23 of the said Order. On remand both the parties would be able to proceed with the suit on merits from the stage which is recorded after 10/5/1991 and in case the hearings were concluded and the suit was reserved for order prior to 10/5/1991, there could not be any remand.

8. In the result, this appeal is disposed of in terms of the following order:-

(a) If the trial court had concluded the hearings in Regular Civil Suit No.52 of 1988 and it was reserved for pronouncement of judgment prior to 10/5/1991, the order of remand would be a nullity and the plaintiff may be at liberty to apply for restoration of Civil Appeal No.268 of 1991 by furnishing a copy of this order.

(b) If the hearing in Regular Civil Suit No.52 of 1988 was not concluded prior to 10/5/1991, the remand order would stand confirmed under Order 41 Rule 23A of C.P.C. and the trial court would proceed with the trial of the suit afresh from the stage which was recorded after 10/5/1991 and the suit shall be decided on its own merits as expeditiously as possible and in any case before 31st December, 2005.

(c) The interim order passed by this court hereby stands vacated. No cost.

(B.H. Marlapalle,J.)